

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL CANNOY and TAMMY CANNOY,

Plaintiffs/Counter-Defendants-
Appellees,

v

INTERSTATE BUILDERS, INC. and DENISE R.
NEEL,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED

January 3, 2003

No. 232710

Crawford Circuit Court

LC No. 99-004997-CK

Before: Hood, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

In this action to set aside the mortgage foreclosure sale of plaintiffs Michael and Tammy Cannoy's home, defendants Interstate Builders, Inc., and Denise R. Neel appeal as of right from a judgment in favor of the Cannoy's following a bench trial. We affirm in part, reverse in part, and remand.

I. Basic Facts and Procedural History

In June 1998, the Cannoy's contacted Interstate after viewing the company's newspaper insert touting the beauty and affordability of vinyl siding. The Cannoy's then met with an Interstate representative on at least two occasions during which the Cannoy's executed a number of documents. These documents included a home improvement installment contract and a mortgage securing what the Cannoy's believed to be the contract price of \$12,400, including interest and finance charges. When Interstate finished siding the Cannoy's home in August 1998, the Cannoy's complained to Interstate that the siding widths and finishes were mismatched. Interstate agreed to correct these problems. At about that same time, the Cannoy's received a payment booklet from Neel, the girlfriend of Interstate's president and the person to whom Interstate had assigned the Cannoy's mortgage. After realizing that the 300 monthly payments of \$141.63 demanded by Neel exceeded the \$12,400 contract price by more than \$30,000, the Cannoy's refused to make any payment on the mortgage. As a result, Neel initiated foreclosure proceedings against the Cannoy's home in December 1998. Lacking the resources to retain legal representation in those proceedings, the Cannoy's failed to defend against the foreclosure and their home was sold to Neel. Neel received a sheriff's deed to the property in March 1999 and,

following expiration of the six-month statutory redemption period, initiated eviction proceedings against the Cannoys in district court.¹

In November 1999, the Cannoys filed this suit in circuit court. Alleging breach of contract and violation of Michigan's consumer protection act, MCL 445.901 *et seq.*, and home improvement finance act, MCL 445.1101 *et seq.*, the Cannoys sought to have the March 1999 foreclosure sale of their home set aside. In response, Interstate and Neel raised a number of counterclaims, including unjust enrichment, and moved for summary disposition of the Cannoys' claims under MCR 2.116(C)(7), (9) and (10). Interstate and Neel argued that Neel had lawfully obtained her sheriff's deed through proper foreclosure proceedings. They contended that laches barred the Cannoys from asserting their claims because they had failed to contest Neel's interest in the property until after foreclosure was complete and the redemption period had expired. Noting that, despite their delay, the Cannoys' action was commenced within the limitation periods applicable to their claims, and that genuine issues of material fact regarding the enforceability of the underlying contract existed, the trial court denied the motion.

Following a bench trial, the trial court found the contract underlying the Cannoys' mortgage to be unenforceable as a result of a number of statutory violations by Interstate, including an illegal rate of interest, improper execution of documents, and misrepresentation of licensing requirements. The trial court concluded that the manner in which Interstate had presented the Cannoys with the relevant documentation misrepresented the true cost of the contract, in violation of the Michigan consumer protection act. The trial court also found that the "substandard" and "shoddy" nature of the work performed by Interstate, which caused additional damage to the Cannoys' home, constituted a breach of contract. On the basis of these findings and conclusions, the trial court declared the sheriff's deed acquired by Neel to be null and void, and ordered that the Cannoys' mortgage be discharged. Additionally, the trial court awarded plaintiffs costs and reasonable attorney fees, as permitted under the consumer protection act.² The resulting judgment included an award of \$7,041 dollars.

II. Laches

A. Standard Of Review

Interstate and Neel argue that the trial court erred in failing to conclude that laches, an equitable doctrine, barred the Cannoys' claims. This Court reviews a trial court's decision regarding laches for clear error.³

¹ Although the current posture of the summary proceedings instituted by Neel in district court is not clear, it is not disputed that the matter was forestalled in order to allow plaintiffs to file the instant suit in the circuit court.

² See MCL 445.911(2).

³ *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998).

B. Analysis

The doctrine of laches is a tool of equity intended to remedy the prejudice resulting from a party's delay in asserting a legal right,⁴ and is "viewed as the equitable counterpart to the statute of limitations defense available at law."⁵ The limitation periods applicable to actions at law thus apply "by analogy" to equitable claims.⁶ Accordingly, "[m]ere delay in asserting a claim for a period less than the statute of limitations does not, in the absence of extraordinary circumstances, constitute such laches as will defeat [a] plaintiff's recovery either in law or in equity."⁷

In this case, the Cannoys filed their claims within the six-year statutory period of limitations applicable to breach of contract claims⁸ and claims brought under the consumer protection act.⁹ Moreover, the circumstances surrounding the Cannoys' delay in bringing these claims were not so extraordinary that they warrant applying the doctrine to bar those claims. Indeed, as in *Manufacturers Hanover Mortgage Corp v Snell*,¹⁰ the Cannoys were merely "typical mortgagors" who, without the financial means to initiate an independent legal action to challenge the validity of the mortgage and subsequent foreclosure sale, first defended against the mortgagee's claim to their property after commencement of eviction proceedings. On the basis of these facts, we conclude that the trial court correctly declined to apply the doctrine of laches to bar the Cannoys' claims.

III. Money Judgment

A. Standard Of Review

Interstate and Neel argue that the trial court improperly subjected Neel, as the holder of the Cannoys' mortgage, to liability for the monetary award in this case. This issue requires us to interpret and apply a statute, a task we undertake using de novo review.¹¹

B. Home Improvement Finance Act

Section 207 of the home improvement finance act provides, in relevant part, that

⁴ *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996).

⁵ *Eberhard v Harper-Grace Hospitals*, 179 Mich App 24, 35; 445 NW2d 469 (1989).

⁶ *Lothian v Detroit*, 414 Mich 160, 166-168; 324 NW2d 9 (1982).

⁷ *Kaminski v Wayne Co Bd of Auditors*, 287 Mich 62, 67; 282 NW 902 (1938).

⁸ MCL 600.5807(8).

⁹ MCL 445.911(7).

¹⁰ *Manufacturers Hanover Mortgage Corp v Snell*, 142 Mich App 548, 553-554; 370 NW2d 401 (1985).

¹¹ See *Attorney General v Michigan Public Service Comm*, 249 Mich App 424, 434; 642 NW2d 691 (2002).

[n]otwithstanding the provision of any other law and notwithstanding any agreement to the contrary:

* * *

(b) A holder of a home improvement contract, home improvement charge agreement, or other evidence of indebtedness of the buyer is subject to all the claims and defenses of the buyer arising out of the home improvement installment sale or a home improvement charge sale, *but the buyer's recovery shall not exceed the amount paid to the holder thereunder.*^[12]

While the home improvement finance act subjects Neel, as the holder of the Cannoy's mortgage, to all the Cannoy's claims and defenses "arising from the home improvement installment sale," the act expressly limits the Cannoy's recovery on those claims to the amount they paid to Neel under the mortgage.¹³ The record is settled that the Cannoy's paid nothing to Neel as the assigned holder of their mortgage. Consequently, under the clear and unambiguous language of MCL 445.1207(b), Neel cannot be held personally liable for any portion of the amount the trial court awarded to the Cannoy's. This conclusion remains true despite the trial court's finding that, as the long-time girlfriend of Interstate's president, Neel was not a bona fide purchaser for value. The plain language of the statute simply does not permit such liability, and we are bound to apply the statute as written.¹⁴ Of course, this holding does not affect the equitable remedies the trial court granted the Cannoy's.

To the extent that the monetary award in this case actually reflects reasonable attorney fees to which the Cannoy's are entitled under the Michigan consumer protection act,¹⁵ we are not at liberty to affirm the monetary portion of the judgment as it concerns Neel. The trial court in this case did not find that Neel, as an individual, was part of any violation of the consumer protection act. Indeed there was no evidence to support such a finding. Thus, the trial court lacked the authority to hold Neel liable for the Cannoy's attorney's fees under that act.

Critically, however, we note that defendants limit their argument regarding this issue to Neel's liability, not Interstate's duty to pay the monetary judgment. As a result, we do not consider whether Interstate should be excused from paying the award the trial court ordered under any legal theory. Consequently, while our holding excuses Neel from paying any monetary award, on remand the judgment in this case need only be clarified to reflect that Interstate solely has the duty to pay; the judgment should not be altered in any other way.

¹² MCL 445.1207 (emphasis added).

¹³ MCL 445.1207(b).

¹⁴ See *Wayne Co v Dep't of Corrections Director*, 204 Mich App 712, 714; 516 NW2d 535 (1994) (where the language employed in a statute is plain, certain, and unambiguous, the statute must be applied as written).

¹⁵ See MCL 445.911(2).

IV. Notary Public As Witness

Interstate and Neel next assert that the trial court erred in finding that their agent acted improperly in his role as notary public by acting both as a witness and as a notary to the Cannoy's execution of the mortgage. However, the trial court's assessment of the agent's conduct was not necessary to its disposition of the dispute, and statements not essential to a court's disposition of a dispute are merely obiter dictum, lacking the force of an adjudication.¹⁶ Accordingly, we decline to address the trial court's finding in this regard.

V. Defendants' Equitable Claim

Interstate and Neel contend that the trial court improperly denied them equitable relief in the form of compensation for the reasonable value of the services they rendered to the Cannoy's, relying on *Republic Bank v Modular One LLC*.¹⁷ However, the Michigan Supreme Court has since released its decision in *Stokes v Millen Roofing Co*,¹⁸ which expressly overruled *Republic Bank* and held that equity may not "be used to defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction."¹⁹ Accordingly, the trial court did not err in denying defendants' claim for equitable relief.

VI. Conclusion

In conclusion, the Cannoy's ask this Court to allow them to tax the costs of this appeal. MCR 7.219(A) states that, "[e]xcept as the Court of Appeals otherwise directs, the prevailing party in a civil case is entitled to costs." MCR 7.219(H) provides that unless MCR 7.219 directs otherwise, "MCR 2.625 applies generally to taxation of costs in the Court of Appeals." MCR 2.625(B) provides a mechanism for determining whether a party is a "prevailing party," explaining:

In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

However, as a rule of civil procedure applicable to the trial courts, MCR 2.625(B) is not tailored to the appellate process, in which the number of issues presented rarely depends on the number of causes action or defenses pleaded in the lower court. Accordingly, this Court has adopted a simpler working definition of prevailing party as the party that prevails "fully."²⁰ If a party loses

¹⁶ *Arco Industries Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143, 147; 594 NW2d 74 (1998).

¹⁷ *Republic Bank v Modular One LLC*, 232 Mich App 444, 450; 591 NW2d 335 (1998).

¹⁸ *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002).

¹⁹ *Id.* at 671-673.

²⁰ See, e.g., *Manning v City of East Tawas*, 234 Mich app 244, 254; 593 W2d 649 (1999) ("No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.").

on appeal in at least one respect, then this Court typically holds that the party is *not* entitled to costs.²¹

Unfortunately, though perhaps deserving of costs, the Cannos did not prevail fully in this appeal. Rather, defendants successfully argued that Denise Neel cannot be held personally liable for the monetary portion of the judgment the trial court entered in this case. Thus, the Cannos did not prevail fully in this case and are not entitled to tax costs.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. No costs of appeal may be taxed, neither party having prevailed fully. We do not retain jurisdiction.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Peter D. O'Connell

²¹ See, e.g., *Michigan Township Participating Plan v Federal Ins Co*, 233 Mich App 422, 437; 592 NW2d 760 (1999).